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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. RICARDO AVALOS, Defendant.	Criminal Case No. 08CR1269-L DATE: May 27, 2008 TIME: 2:00 p.m. **UNITED STATES' RESPONSE AND OPPOSITION TO DEFENDANT'S MOTION TO COMPEL DISCOVERY** **TOGETHER WITH STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES AND GOVERNMENT'S MOTION FOR RECIPROCAL DISCOVERY**

COMES NOW, the Plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Karen P. Hewitt, United States Attorney, and Randy K. Jones, Assistant U.S. Attorney, and hereby files its Response and Opposition to defendant's above-referenced motion. Said response is based upon the files and records of the case, together with the attached statement of facts and memorandum of points and authorities.

I.

STATEMENT OF THE CASE

On March 28, 2008, a federal grand jury returned a one-count indictment charging Defendant Ricardo Avalos ("Avalos") with being a deported alien found in the United States, in violation of 8 U.S.C. § 1326(a) and (b). On April 24, 2008, Avalos was arraigned on the Indictment and entered a plea of not guilty. On May 3, 2008, Avalos filed a discovery motion. The motion hearing is scheduled for May 27, 2008 at 2:00 p.m.

II

STATEMENT OF THE FACTS

A. INCIDENT

On March 28, 2008, at approximately 12:30 a.m., Border Patrol Agent Juan Sanchez was performing linewatch duties in the Otay Mountains within the Chula Vista Station Area of Responsibility. Agent Sanchez was alerted by San Diego Sector Communications, via Department of Homeland Security (DHS) service radio, of a seismic intrusion device activation in an area known to Border Patrol Agents as the "76 Firebreak." This area is located approximately four miles east of the Otay Mesa, California Port of Entry and approximately three miles north of the United States/Mexico International Boundary. After arriving in the area, using an infra-red scope, Agent Sanchez encountered two individuals running into the high brush. After a brief chase, Agent Sanchez found both individuals, along with two more people, hiding in the brush. He identified himself as a United States Border Patrol Agent and questioned each individual as to their citizenship and nationality. Each individual responded, "Mexico," including one later identified as Avalos. He then asked each individual if they had any immigration documents that would allow them to be or remain in the United States legally. Each individual responded "No." At approximately 1:00 a.m., Agent Sanchez placed the four individuals under arrest and had them transported to the Chula Vista Border Patrol Station for further processing.

B. AVALOS' POST-ARREST STATEMENT

At approximately 2:35 p.m., on March 28, 2008, a digitally recorded audio/video taped sworn statement was conducted of Avalos by Border Patrol Agent Daniel Avelar in the Chula Vista Border Patrol Station/Sector Intelligence Groups Interview Room, as witnessed by Border Patrol Agent Marissa

Richter. At 2:30 p.m. Avalos was advised that his administrative rights as per I-826 no longer applied and that he would be charged criminally for 8 U.S.C. 1326 Re-entry after Deportation. Avalos stated that he understood that his request for a voluntary return to Mexico as per his I-826 would not be granted. At approximately 2:38 p.m., Avalos was advised of his Mexican Consulate Communication Rights. Avalos stated that he understood his rights, but declined to exercise them at this time. At approximately 2:39 p.m., Avalos was given the Miranda warnings as per Service Form I-214. Avalos requested that the Miranda warnings be read to him in the English language after which he stated that he understood his rights and that he did not wish to speak without a lawyer present. No further questions were asked of Avalos.

III.

POINTS AND AUTHORITIES

A. THE GOVERNMENT WILL COMPLY WITH ALL DISCOVERY OBLIGATIONS

The Government has complied and will continue to comply with its discovery obligations under Brady v. Maryland, 373 U.S. 83 (1963), the Jencks Act (18 U.S.C. 3500), and Rule 16 of the Federal Rules of Criminal Procedure. The Government anticipates that all discovery issues can be resolved amicably and informally, and has addressed Avalos' specific requests below:

(1) Defendant's Statements. The Government recognizes its obligation under Rules 16(a)(1)(A) and 16(a)(1)(B) to provide to Avalos the substance of his oral statements and his written statements. The Government has produced all of Avalos' statements that are known to the undersigned Assistant U.S. Attorney at this date. If the Government discovers additional oral or written statements that require disclosure under Rule 16(a)(1)(A) or Rule 16(a)(1)(B), such statements will be provided to Avalos.

The Government has no objection to the preservation of the handwritten notes taken by any of the agents and officers. See United States v. Harris, 543 F.2d 1247, 1253 (9th Cir. 1976) (agents must preserve their original notes of interviews of an accused or prospective government witnesses). However, the Government objects to providing Avalos with a copy of the rough notes at this time. Rule 16(a)(1)(A) does not require disclosure of the rough notes where the content of those notes have been accurately reflected in a type-written report. See United States v. Brown, 303 F.3d 582, 590 (5th Cir. 2002); United States v. Coe, 220 F.3d 573, 583 (7th Cir. 2000) (Rule 16(a)(1)(A) does not require disclosure of an agent's notes even where there are "minor discrepancies" between the notes and a report). The Government is not required to produce rough notes pursuant to the Jencks Act, because the notes do not constitute "statements" (as defined in 18 U.S.C. § 3500(e)) unless the notes (1) comprise both a substantially verbatim narrative of a witness' assertion, and (2) have been approved or adopted by the witness. United States v. Spencer, 618 F.2d 605, 606-07 (9th Cir. 1980). The rough notes in this case do not constitute "statements" in accordance with the Jencks Act. See United States v. Ramirez, 954 F.2d 1035, 1038-39 (5th Cir. 1992) (rough notes were not statements under the Jencks Act where notes were scattered and all the information contained in the notes was available in other forms). The notes are not Brady material because the notes do not present any material exculpatory information, or any evidence favorable to Avalos that is material to guilt or punishment. Brown, 303 F.3d at 595-96 (rough notes were not Brady material because the notes were neither favorable to the defense nor material to defendant's guilt or punishment); United States v. Ramos, 27 F.3d 65, 71 (3rd Cir. 1994) (mere speculation that agents' rough notes contained Brady evidence was insufficient). If, during a future evidentiary hearing, certain rough notes become discoverable under Rule 16, the Jencks Act, or Brady, the notes in question will be provided to Avalos.

(2) Brady and Giglio Material. The Government has and will continue to perform its duty under Brady to disclose material exculpatory information or evidence favorable to Avalos when such evidence is material to guilt or punishment, including arrest reports and dispatch tapes. The Government recognizes that its obligation under Brady covers not only exculpatory evidence, but also evidence that could be used to impeach witnesses who testify on behalf of the United States. See Giglio v. United States, 405 U.S. 150, 154 (1972); United States v. Bagley, 473 U.S. 667, 676-77 (1985). This obligation also extends to evidence that was not requested by the defense. Bagley, 473 U.S. at 682; United States v. Agurs, 427 U.S. 97, 107-10 (1976). "Evidence is material, and must be disclosed (pursuant to Brady), 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Carriger v. Stewart, 132 F.3d 463, 479 (9th Cir. 1997) (en banc). The final determination of materiality is based on the "suppressed evidence considered collectively, not item by item." Kyles v. Whitley, 514 U.S. 419, 436-37 (1995).

Brady does not, however, mandate that the Government open all of its files for discovery. See United States v. Henke, 222 F.3d 633, 642-44 (9th Cir. 2000)(per curiam). Under Brady, the Government is not required to provide: (1) neutral, irrelevant, speculative, or inculpatory evidence (see United States v. Smith, 282 F.3d 758, 770 (9th Cir. 2002)); (2) evidence available to the defendant from other sources (see United States v. Bracy, 67 F.3d 1421, 1428-29 (9th Cir. 1995)); (3) evidence that the defendant already possesses (see United States v. Mikaelian, 168 F.3d 380-389-90 (9th Cir. 1999) amended by 180 F.3d 1091 (9th Cir. 1999)); or (4) evidence that the undersigned Assistant U.S. Attorney could not reasonably be imputed to have knowledge or control over. See United States v. Hanson, 262 F.3d 1217, 1234-35 (11th Cir. 2001).

Brady does not require the Government "to create exculpatory evidence that does not exist," United States v. Sukumolahan, 610 F.2d 685, 687 (9th Cir. 1980), but only requires that the Government "supply a defendant with exculpatory information of which it is aware." United States v. Flores, 540 F.2d 432, 438 (9th Cir. 1976).

(3) Any Proposed Rule 404(b) Evidence. The Government will provide Avalos with any information regarding Avalos' known prior criminal offenses. The Government will disclose in sufficient time advance of trial, the general nature of any "other bad acts" evidence that the Government intends to introduce at trial pursuant to Fed. R. Evid. 404(b). To the extent possible, the Government will provide the Rule 404(b) evidence to CASTRO within two weeks prior to trial. The Government will also provide notice of all impeachment evidence by prior criminal convictions as required by Fed. R. Evid. 609.

(4) Defendant's A-file. As previously discussed, the Government recognizes its obligation under Brady and Giglio to provide material evidence that could be used to impeach Government witnesses.

B. GOVERNMENT'S MOTION FOR RECIPROCAL DISCOVERY

1. Rule 16(b)

Defendant has invoked Federal Rule of Criminal Procedure 16(a) in his motion for discovery and the Government has already voluntarily complied with the requirements of Federal Rule of Criminal Procedure 16(a). Therefore, Rule 16(b) should presently be determined to be operable as to Defendant.

The Government, pursuant to Rule 16(b), hereby requests that Defendant permit the Government to inspect, copy, and photograph any and all books, papers, documents, photographs, tangible objects, or make copies of portions thereof, which are within the possession, custody, or control of Defendant and which he intends to introduce as evidence in his case-in-chief at trial. The Government further requests that it be permitted to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with this case, which are in the possession or control of Defendant, which she intends to introduce as evidence-in-chief at the trial or which were prepared by a witness whom Defendant intends to call as a witness. The Government also requests that the Court make such orders as it deems necessary under Rule 16(d)(l) and (2) to insure that the Government receives the discovery to which it is entitled.

2. Rule 26.2

Federal Rule of Criminal Procedure 26.2 requires the production of prior statements of all witnesses, except any statement of Defendant. The rule provides for the reciprocal production of Jencks statements. The time frame established by the rule requires the statement to be provided after the witness has testified, as in the Jencks Act. Therefore, the Government hereby requests that Defendant be ordered to supply all prior statements of defense witnesses by a reasonable date before trial to be set by the Court. This order should include any form these statements are memorialized in, including, but not limited to, tape recordings, handwritten or typed notes, and/or reports.

IV.

CONCLUSION

For the foregoing reasons, Avalos' motion should be denied.

DATED: May 23, 2008

Respectfully Submitted,

KAREN P. HEWITT
United States Attorney

s/ Randy K. Jones
RANDY K. JONES
Assistant United States Attorney
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. RICARDO AVALOS, Defendant.	Case No. 08CR1269 CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, RANDY K. JONES, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of **United States' Response and Opposition to Defendant's Motion to Compel Discovery Together with Statement of Facts and Memorandum of Points and Authorities** on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. George W. Hunt , gwhunt2002@yahoo.com

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 23, 2008

s/ Randy K. Jones
RANDY K. JONES